

# INTERNATIONAL LAW and the UNDECLARED WAR

By

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# INTERNATIONAL LAW AND THE UNDECLARED WAR

## Some Preliminary Observations

### I. The Nature of the Undeclared War

#### 1. WAR IN INTERNATIONAL LAW

This is a preliminary study of the Sino-Japanese Undeclared War from the point of view of International Law. While the conflict is still going on, it is impossible to make a comprehensive or exhaustive study. The aim of this short paper is to indicate certain more or less obvious principles and rules of International Law that are applicable to the Undeclared War.

The right to make war was in former days legally recognized in International Law. It was considered either as a legal remedy or as an instrument for changing existing rights and obligations.<sup>1</sup> In any case, resort to war was a legitimate prerogative of the individual sovereign State. According to traditional International Law, therefore, both China and Japan had the individual right to make war.

Since 1920, the status of war in law, however, has been greatly modified. The Covenant of the League of Nations is a first significant attempt to eliminate war and to preserve peace. The Covenant not only contains a pledge by the Members "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League" (Article X), but also provides for an immediate meeting of the Council of the League "whenever there is war or threat of war" which the Covenant declares to be "a matter of concern to the whole League" (Article XI). The Members further agree that

if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement, or to inquiry by the Council and they agree in no case to resort to war until three months after the award by arbitrators or the judicial settlement or the report by the Council. (Article XII.)

Thus the nations that signed the Covenant have agreed that war between them, or, indeed, war between any nations, is not alone the private concern of those nations but is a matter of legitimate concern to nations not directly involved, and have authorized a conference on methods to ward off the common danger.

The Nine Power Treaty of the Washington Conference is an example of

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<sup>1</sup> See L. Oppenheim, *International Law* (5th. ed, London, 1935), II, 147-149.

a similar spirit directed to the particular situation in the Far East and to the danger to all nations of an attack on China. In that Treaty, the Contracting Powers, including Japan, agree "to respect the sovereignty, the independence, and the territorial and administrative integrity of China." (Article I.) The Treaty further provides:

The Contracting Powers agree that, whenever a situation arises which in the opinion of any one of them involves the application of the stipulations of the present Treaty, and renders desirable discussion of such application, there shall be full and frank communication between the Contracting Powers concerned. (Article VII.)

The Nine Power Treaty has thus provided for a discussion on any situation, which may arise, threatening or violating the sovereignty, the independence, and the territorial and administrative integrity of China. Any attack upon China is therefore a matter of legitimate concern to all the signatory States of the Nine Power Treaty.

The Second Report of the Far Eastern Advisory Committee of the League of Nations says:

It cannot be admitted that the present Far Eastern conflict, which has been shown to involve infringement of Japan's treaty obligations, is one which can as of right only be settled by direct methods between the Chinese and Japanese Governments. On the contrary, the whole situation must be taken into the fullest consideration and particularly any appropriate means must be examined whereby peace may be re-established in conformity with the principles of the Covenant and International Law and with the provisions of the existing treaties.<sup>2</sup>

The most significant attempt to eliminate war and to maintain peace is the Pact of Paris, of which both China and Japan are signatory States. The Pact reads:

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Since the Pact was concluded, war has lost much of its former legal nature. While the meaning of the "outlawry of war" cannot be exactly determined, the absolute right to make war, as formerly recognized in International Law, is no longer permissible. Fenwick says in his *International Law*:

If the old individual "right to make war" as a sanction of International Law still persists at all, it is now so hedged in with restrictive conditions as to be but a legal shadow of its former self . . . it is now scarcely possible for a State to take the law into its own hands without violating its international obligations. . . .<sup>3</sup>

<sup>2</sup> *The New York Times*, October 6, 1937.

<sup>3</sup> C. G. Fenwick, *International Law* (New York, 1934), p. 43.

The latest edition of Oppenheim's *International Law* says:

War cannot now legally, as it could prior to the conclusion of the Pact, be resorted to either as a legal remedy or as an instrument for changing the law. Resort to war is no longer a discretionary prerogative right of States signatories of the Pact; it is a matter of legitimate concern for other signatories whose legal rights, even if they remain neutral, are violated by recourse to war in breach of the Pact.<sup>4</sup>

In consequence of the recent international organization for peace, it is clear that the Sino-Japanese Undeclared War is not alone the private matter of China and Japan, and that, being a signatory Power of the Pact of Paris, Japan cannot lawfully make war on China.

## 2. SELF-DEFENCE

"It is believed," says Quincy Wright, "the legal case against war and armed violence in international affairs is complete. War cannot occur without violations of the Pact (of Paris), and armed violence cannot be justified except within the legal concept of self-defence."<sup>5</sup>

The Pact of Paris, while renouncing generally "war as an instrument of national policy," does not intend, as the identic notes of the United States to the original signatories say, "to restrict or impair in any way the right of self-defence. That right is inherent in every sovereign State and is implicit in any treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence."<sup>6</sup>

This reservation of the right of self-defence, it is important to observe, does not in any way render the Pact ineffective or invalid. As former Secretary of State Stimson has said, "This right (of self-defence) is so inherent and universal that it was not deemed necessary even to insert it expressly in the treaty. It is also so well understood that it does not weaken the treaty."<sup>7</sup>

That every State has the power to take defensive action is never disputed. When emergency arises, the State alone is competent to decide whether circumstances require such action. "But the question whether the exercise of the power is within the 'right of self-defence' as understood in International Law . . . is a wholly different question."<sup>8</sup> The ultimate determination of this question is a matter of international character and is not subject to the unilateral construction of any single State resorting to an alleged war of self-

<sup>4</sup> L. Oppenheim, *op. cit.*, II, 167.

<sup>5</sup> Wright, "The Meaning of the Pact of Paris," *The American Journal of International Law*, XXVII (1933), p. 61.

<sup>6</sup> See Hunter Miller, *The Pact of Paris* (1928), pp. 213 ff.

<sup>7</sup> "The Statement of Secretary of State Stimson, August 8, 1932," *International Conciliation*, No. 286 (1933), p. 23.

<sup>8</sup> See Wright, *op. cit.*, pp. 46-47. The author on page 48 says: "This interpretation is fully supported by the actions under the Pact. The Powers, including Japan, in approving the resolution of December 10, 1931, on the basis of which the Lytton Commission was sent to Manchuria, recognized that the plea of self-defence was subject to international investigation. Japan did not at that time deny the competence of the League or the Commission to examine the question, but rather sought to prove its case before these agencies. Neither these agencies nor the United States have admitted that this was a domestic question for Japan beyond the scope of international procedure."



defence. "The legality of recourse to force in self-defence is in each case a proper subject for impartial determination by judicial or other bodies."<sup>9</sup>

In the light of the foregoing discussion, it is clear that neither China nor Japan alone is competent to determine finally whether it has acted in self-defence in the Undeclared War, so as to bind other signatories of the Pact of Paris. In the following paragraphs, the writer will turn to neutral and impartial authorities and agencies for judicial statements, with a view to arriving at a tentative judgment on the Sino-Japanese conflict.

### 3. THE CASE OF MANCHURIA

Before determining the nature of the present conflict, it is appropriate to review briefly the case of Manchuria.

On the ground of self-defence, Manchuria was occupied by Japan in 1931; and in the subsequent year "Manchukuo" was created allegedly "as a result of separatist movements within China herself."<sup>10</sup>

Regarding the occupation of Manchuria, the Lytton Report stated clearly that the military operations of the Japanese could not be regarded "as measures of legitimate self-defence."<sup>11</sup> Secretary Stimson said on August 8, 1932, that the limits of self-defence had been clearly defined by countless precedents and that "a nation which sought to mask imperialistic policy under the guise of the defence of its nationals would soon be unmasked."<sup>12</sup>

Not only was the occupation of Manchuria not of the nature of self-defence, it was also incompatible with the obligations of several international agreements. At the Council of the League of Nations, M. Briand declared that "public opinion would not readily admit that military operations under these circumstances could be regarded as coming under the heading of pacific means" by which the signatories of the Pact of Paris were to seek the solution of any international dispute.<sup>13</sup> In his letter to Senator Borah on February 24, 1932, Secretary of State Stimson considered it "clear beyond peradventure that a situation has developed which cannot, under any circumstances, be reconciled with the obligations" of the Pact of Paris and the Nine Power Treaty.<sup>14</sup>

In reference to the creation of "Manchukuo," the Lytton Report declared: "It is clear that the Independence Movement which had never been heard of before September, 1931, was made possible only by the presence of

<sup>9</sup> Oppenheim, *op. cit.*, II, 159. "But elementary principles of interpretation preclude a construction which gives to a State resorting to an alleged war of self-defence the right of ultimate determination, with a legally conclusive effect, of the legality of such action."

<sup>10</sup> The Address of Count Uchida, Minister of Foreign Affairs of Japan, at the 63rd Session of the Imperial Diet, August 25, 1932. The text may be found in *International Conciliation*, No. 286 (1933), pp. 34-36.

<sup>11</sup> The Lytton Report, Ch. IV.

<sup>12</sup> *International Conciliation*, No. 286 (1933), p. 23.

<sup>13</sup> League of Nations, 65th Session of the Council, Min., par. 2956. A similar opinion was frequently expressed during the general debate in the Assembly, March 5, 7 and 8, 1932, especially by the representatives of Sweden, Switzerland, Germany, Canada, Bulgaria, South Africa, and Latvia. See League of Nations, *Official Journal*, 1932. Special Supp., No. 101, pp. 47-79.

<sup>14</sup> *International Conciliation*, No. 286 (1933), p. 17.

the Japanese troops." The Report went on to say that "there is no general Chinese support for the 'Manchukuo Government' which is regarded by the local Chinese as an instrument of the Japanese."<sup>15</sup>

The illegality of "Manchukuo" is most conclusively established by the fact that the United States and the League Members have refused to accord recognition of its existence. In identic notes to Japan and China on January 7, 1932, the American Government declared that "it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris." In endorsing the doctrine of non-recognition, the League Assembly on March 11, 1932, passed a resolution which reads: "The Assembly . . . declares that it is incumbent upon the Members of the League of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."

The case of Manchuria is a clear one from the point of view of International Law. The military occupation of Manchuria was not a measure of self-defence, nor was the creation of "Manchukuo" a result of any separatist movement within China. In seizing Manchuria by military force and in establishing the "Manchukuo Government," Japan violated the Covenant of the League of Nations, the Nine Power Treaty, and the Pact of Paris.

#### 4. THE PRESENT CASE

The immediate origins of the present conflict are the Lukouchiao incident of July 7, 1937—a skirmish at night between two small bodies of Japanese and Chinese troops—and the Hungjiao incident of August 9—in which two Japanese marines and one Chinese airfield guard were killed. Without entering into the details of these local incidents,<sup>16</sup> we know that at present, the land, naval, and air forces of China and Japan are engaged in a violent conflict covering almost the entire length of the Chinese Republic.

Japan declares: "Japan's military operations in China today have been entirely caused by China's provocative attitude. Japan's action is entirely self-defence."<sup>17</sup> On the other hand, China argues that the actions of the Japanese land, naval, and air forces in China "constitute a case of external aggression."<sup>18</sup>

The Japanese Government has declared its objectives in China in no uncertain language. Foreign Minister Hirota said:

We are fighting anti-Japanese movements in China. These exist largely in the Chinese Army, and General Chiang Kai-shek is their

<sup>15</sup> The Lytton Report, Ch. VI.

<sup>16</sup> The League of Nations has already found that the maneuver of the Japanese troops at Lukouchiao on July 7 was contrary to the Final Protocol of 1901. As yet, no neutral authorities have clarified the legal nature of the Hungjiao incident.

<sup>17</sup> For the text of the official statement of the Japanese Foreign Office, see *The New York Times*, October 9, 1937.

<sup>18</sup> For the text of the resolution submitted by China to the Advisory Committee of the League of Nations, see *The New York Times*, October 2, 1937.



spearhead. By a fundamental solution of the China question, we mean a state of affairs in which there will be no danger of a repetition of the present circumstances. . . .

We want to see China governed by statesmen who can maintain friendly relations with us.<sup>19</sup>

This statement can mean only that the Japanese aim is the destruction of the Chinese Army and of the Government under Chiang Kai-shek, who has rapidly established order and unity in China and who is capable of representing the aims and interests of an independent Chinese nation.

This statement is not the only declaration of the Japanese policy. In his speech to the Imperial Diet, Hirota declared:

It is hardly necessary to say that the basic policy of the Japanese Government aims at the stabilization of East Asia through conciliation and cooperation between Japan, Manchukuo and China for their common prosperity and well-being. Since China, ignoring our true motive, mobilized her vast armies against us we can do no other than counter it by force of arms.

The urgent need of this moment is that we take resolute attitude and compel China to mend her ways. Japan has no other objective than to see a happy and tranquil North China and all of China freed from the danger of a recurrence of such calamitous hostilities as at present and Sino-Japanese relations so adjusted as to enable *us* to put into practice *our* above-mentioned policy. Let us hope that the statesmen of China be brought to take a broad view of East Asia, that they speedily realize their mistake, and that turning a new leaf, they will act in unison with the high aim and aspirations of Japan.<sup>20</sup>

What this speech means is evidenced in the establishment of an Inner Mongolian government, known as "Khoko," in the City of Kweisui in the Province of Suiyuan, a government that will rule "in accordance with the principles of the 'kingly way' as displayed by the Government of Manchukuo"; and in the intimation that another new government will be set up in North China, which will "cooperate" with Japan in a spirit of "friendship." It is obvious that the Japanese Empire aims at dividing and ruling China, at setting up an Inner Mongolian State and a North China State in addition to the puppet regime of Manchukuo, at dictating a *Pax Nipponica* upon China. To this end, Japan has to destroy the Chinese Government that has shown the will and the power to assert the independence of China. The present Japanese campaign is against the establishment of an orderly government of the Chinese, for the Chinese, and by the Chinese, in the wide territories of the great republic, a government that is to maintain both the rights and the duties of China as a member of the family of nations. It is idle for the Japanese Government,

<sup>19</sup> *The New York Times*, September 3, 1937.

<sup>20</sup> *The New York Times*, September 5, 1937. Commenting on the Japanese policy, the *Times* on a previous occasion said editorially on July 28: "Professing a mission to secure its 'position as a stabilizing force in East Asia,' Japan is the one country which today menaces the stability and threatens the peace of that area. . . . Professing the desire to achieve Eastern Asiatic continental stability through conciliation and cooperation between Japan, Manchukuo, and China, the Japanese Government now pursues a course which makes such collaboration impossible. . . ."

with these objectives frankly stated, to claim that the widespread operations of its land, naval, and air forces on a front of some 3,000 miles are measures of self-defence.

Concerning Japan's policy, former Secretary of State Stimson in a letter to *The New York Times* on October 6, 1937, made the following remarks:

In general Japan is trying to take control of the development of modern China and to twist its form and nature to suit her own aims, both political and economic. She is trying to develop China in a way which is the exact opposite of the purpose and policy of the Open Door and the Nine Power Treaty. Japan makes no secret of this. We do not have to guess. We have a perfectly frank exposition of her plan in what she has already done in Manchukuo and North China.

She does not contemplate "the preservation of China's territorial and administrative integrity." She is actually engaged in carving up China's territory and herself taking over China's administration. She does not propose equality of commercial opportunity among all nations dealing with China. She is seeking to monopolize that opportunity and has already taken effective steps to do so in Manchukuo.

She is thus trying completely to transform China's own business methods and character and culture and to dominate them to her own national ends. Furthermore, she is not seeking to do this by persuasion or education or by other peaceful means, but by force and terrorism of the most brutal and barbarous kind.

The nature of the present Sino-Japanese conflict has been most authoritatively and conclusively determined by the League Assembly, which represents 52 nations of the world. After reviewing the events of the Sino-Japanese conflict, the Assembly on October 5, 1937, declared:

It cannot, however, be challenged that powerful Japanese armies have invaded Chinese territory and are in military control of large areas, including Peiping itself, that the Japanese Government has taken naval measures to close the Chinese coast to Chinese shipping, and that Japanese aircraft are carrying out bombardments over widely separated regions of the country. . . . The military operations carried on by Japan against China by land, sea, and air are out of all proportion to the incident which occasioned the conflict. . . .<sup>21</sup>

From the point of view of International Law, it is particularly significant to observe that the Assembly added:

The conduct of hostilities by Japanese forces, under the circumstances described, by land, water and air throughout China, is *prima facie* inconsistent with the obligation to respect China's sovereignty, independence and territorial integrity, and also with the obligation never to seek a solution of a dispute with China of whatever origin or character except by pacific means. . . .

It can be justified neither on the basis of existing legal instruments nor on that of rights of self-defence, and it is in contravention of

<sup>21</sup> This and the next quotations are taken from the Text of the First Report submitted by the Far Eastern Advisory Committee and adopted by the League Assembly. Reported in *The New York Times*, October 6, 1937.

Japan's obligations under the Nine Power Treaty and the Pact of Paris.

Concerning the Sino-Japanese conflict, the American Government, acting independently of the League of Nations, issued on October 6, 1937, this statement:

In the light of the unfolding developments in the Far East the Government of the United States has been forced to the conclusion that the action of Japan in China is inconsistent with the principles which should govern the relationships between nations and is contrary to the provisions of the Nine Power Treaty of Feb. 6, 1922, regarding principles and policies to be followed in matters concerning China, and to those of the Kellogg-Briand Pact of August 27, 1928.

Thus the conclusions of this Government with respect to the foregoing are in general accord with those of the Assembly of the League of Nations.<sup>22</sup>

Thus the League Assembly and the United States both firmly declare that Japan is a law-breaker in the present case.

Whereas, without a declaration of war, the Japanese army has invaded Chinese territory, the Japanese navy has blockaded the Chinese coast, and the Japanese air force has attacked many Chinese cities and towns, it is clear beyond peradventure that Japan has committed unlawful acts of external aggression against China.<sup>23</sup>

## 5. LEGAL WAR AND MATERIAL WAR

War is a contention between two or more States through their armed forces.

The present Sino-Japanese conflict is a war in fact, inasmuch as the armed forces of China and Japan are engaged in a violent struggle; but it is not yet a war in law, for no state of war has been formally declared by either party to exist. In other words, it may be regarded as a material war, but not as a legal war.<sup>24</sup>

The present conflict is similar to the Manchurian dispute in this legal aspect. The Manchurian dispute, says the Lytton Report, "is not a case in which one country has declared war on another country. . . ." Yet, "it is a fact that, without declaration of war, a large area of what was indisputably

<sup>22</sup> The full Text may be found in *The New York Times*, October 7, 1937.

<sup>23</sup> The aggressor in an international conflict has been defined as the State which is the first to commit any of the following acts, *inter alia*: (a) Invasion by armed forces, even without a declaration of war, of the territory of another State; (b) Attack by armed land, naval, or air forces, even without a declaration of war, upon the territory, naval vessels, or aircraft of another State; (c) Naval blockade of the coasts or ports of another State.

See *Documents of International Affairs* (1928), edited by Wheeler-Bennett, pp. 218-232, for the various definitions of aggression proposed by the Committee on Security Questions of the Disarmament Conference in May, 1933; by Great Britain in its Draft Convention submitted to the Disarmament Conference in 1933; and by the Convention for the Definition of Aggression of July 3, 1933, between Russia, Afghanistan, Estonia, Latvia, Persia, Poland, Rumania, and Turkey. For earlier efforts to define aggression, see "The Attempt to Define Aggression," *International Conciliation*, No. 264 (1930), pp. 581-652.

<sup>24</sup> Cf. Clyde Eagleton, "The Attempt to Define War," *International Conciliation*, No. 291 (1933), pp. 237-287; and Q. Wright, "When Does War Exist?" *The American Journal of International Law*, XXVI (1932), pp. 362-368. G. G. Wilson says: "The use of physical force by one State within the territory of another State does not necessarily imply the existence of war in the legal sense."

the Chinese territory has been seized and occupied by the armed forces of Japan. . . ." And in its concluding impressive paragraphs, the Report adds: "The relations between China and Japan are those of war in disguise."<sup>25</sup>

According to the Fourth Hague Convention of 1907, hostilities between the contracting parties "must not commence without a previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."

At this writing, Japan has not issued any declaration of war, nor has China recognized the existence of war. The United States has not proclaimed the status of neutrality, thereby avoiding the responsibility for announcing the existence of a state of war. The League of Nations, while condemning Japan as a law-breaker, has carefully shunned the use of the word "war." Since neither Japan nor China, neither the United States nor the League of Nations, has recognized war, from the legal point of view, war cannot be said to exist in the Far East.<sup>26</sup>

Even though the legal status of war does not exist, actual hostilities are being carried on on a large scale between the land, naval, and air forces of China and Japan. The Undeclared War may, therefore, be regarded as a war in the material sense, but not a war in the legal sense.

## II. Rules and Customs of Warfare

The law of war is a body of rules and customs restricting or limiting the methods of warfare. It recognizes two principles. The first is the principle of military necessity, that violence may be used only for the purpose of weakening or destroying the fighting forces of the enemy. The second is the principle of humanity, which is based upon the universal dictates of public morality or public conscience.

The object of the rules of warfare is to limit the sufferings caused by war to the armed forces and to the civil populations of the belligerent countries and to secure as little interference as possible with the peaceful pursuits of neutrals and especially with their commerce on the high seas. The force behind those rules has been the public opinion of the world and the insistence by neutral countries that belligerents respect the rules affecting them and their citizens.

Whatever the status of an undeclared war, the conflicting parties do not have an unlimited right as to the methods of warfare, but are obliged to abide by those rules and customs that are generally recognized by the civilized

<sup>25</sup> The Lytton Report, pp. 126, 127, and 138.

<sup>26</sup> Q. Wright, "When Does War Exist?" *The American Journal of International Law*, XXVI (1932), p. 362. "It is submitted that in case a State using military force disclaims an intention to make war, and the victim of war cannot or does not recognize war, a state of war does not exist until such time as third States recognize that it does."



nations of the world. For an undeclared war is still war.<sup>27</sup> Non-declaration of war does not render void the rights and duties resulting from the law of war. The elementary principles of honorable warfare must under any circumstances be observed.<sup>28</sup>

## 1. LAND WARFARE

(a) *Treatment of Combatants.* It is universally recognized that combatant members of armed forces may be killed or wounded when they are able or willing to fight or to resist capture, and that such combatants as are disabled or captured may be neither killed nor wounded, but must be given quarter.<sup>29</sup>

In the early days of the present armed conflict, General Katsuki, Japanese Commander in North China, declared in advance that no quarter would be given to the Chinese soldiers. In other words, Katsuki plainly warned that all Chinese soldiers who were disabled or captured would not be treated as prisoners of war, as they ought to be, in accordance with International Law.

(b) *Treatment of Non-combatants.* According to International Law, non-combatants are free from all violence and constraint other than that required by military necessity. The persons and property of the unarmed population must be respected and protected.<sup>30</sup>

J. B. Moore says that "among the elementary principles which the development of modern rules of warfare, running through several centuries, has been designed to establish and confirm, the principle most fundamental in character . . . is the distinction between combatants and non-combatants, and the protection of non-combatants against injuries not incidental to military operations against combatants."<sup>31</sup>

In the Undeclared War, wholesale massacres by the Japanese troops of civilians in several Chinese towns and villages have been known. The following are two outstanding cases. A message from Nanking said:

"It is reported that the Japanese have been massacring innocents in the villages under the occupation. The 500 inhabitants of Yangchang were murdered in cold blood by the Japanese soldiers.

"The whole fishing population of 300 were massacred following the Japanese occupation of Huangsha, a tiny islet at the mouth of the Yangtze

<sup>27</sup> Oppenheim, *op. cit.*, II, sec. 96. The author says that a war may break out without a declaration of war or a qualified ultimatum. When war is in actual existence, "all the laws of warfare must find an application, for a war is still war in the eyes of International Law, even though it may be illegally commenced. . . ."

<sup>28</sup> The application of the law of war in the present Undeclared War is most forcefully expressed in Prof. James W. Garner's Letter to *The New York Times*, October 3, 1937.

<sup>29</sup> The Hague Regulations, Art. 23. See Oppenheim, *op. cit.*, II, 280-281; and Fenwick, *op. cit.*, p. 475.

<sup>30</sup> See G. G. Wilson, *International Law* (New York, 1935), pp. 256-257; and Fenwick, *op. cit.*, pp. 450-451.

<sup>31</sup> Quoted in Prof. James W. Garner's Letter to *The New York Times*, October 3, 1937.



River, with the apparent intention of turning the islet into a temporary landing field.”<sup>32</sup>

(c) *Instruments of Warfare*. A rule of International Law prohibits the use in war of asphyxiating, poisonous, or other gases that cause unnecessary injury and suffering.<sup>33</sup>

When General Matsui declared that the Japanese Army was prepared to use every means within its power to subdue its opponents, he apparently meant it quite literally.

On September 25, in a circular statement to the Powers, the Chinese Government declared that “the Japanese militarists have resorted to the use of asphyxiating and poisonous gases. As far as the Chinese army could detect, the Japanese army in the northern province of China had already employed as a weapon of war asphyxiating and noxious gases in two places: One of these places is the historic Nankow Pass, the fall of which was chiefly attributed to the use of such a weapon; the other is Kwan in Hopei Province, on the southern bank of the Hun River, south of Changhsintien.”<sup>34</sup>

On October 7, the Chinese Embassy in London in a statement to the press in black-bordered mourning envelopes charged: “It is definitely ascertained that on the night of October 4 and in the morning of October 5, in the strategic Lotien-Liuhang sector (at Shanghai), where Chinese resistance is most stubborn, the Japanese used gases causing discomfort to the eyes, violent nausea, a state of coma, and several deaths.”<sup>35</sup>

Dr. E. F. Ettinger, chief surgeon of the Nanking Red Cross Hospital, and Dr. Borie, representative in China of the Health Organization of the League of Nations, issued the following medical report.

The undersigned examined three cases in the Red Cross General Hospital in Nanking diagnosed as gas casualties and submit the following findings.

Patients still have marked symptoms of conjunctivitis with photophobia and are covered with blisters varying in diameter between point two to five centimeters. Some blisters are beginning to dry up while others show secondary infection and ulceration. The color of most of the lesions is copperish but some are observed to contain a black pigment.

Hoarseness is a common symptom in all cases. Eyelids of two cases are edematous, with eyes lacrimating constantly. One case arrived with marked broncho pneumonia.

Patients present no wounds and stated that after being three or four hours the center of Japanese attack from artillery and from the air they felt burning all over their bodies. Their eyes started to smart and water. One youngest patient felt pain one hour after the attack.

<sup>32</sup> *The New York Times*, September 18, 1937.

<sup>33</sup> The Hague Regulations, Art. 23; The Treaty of Versailles (1919), Art. 171; The Treaty of Washington (1922), Art. 5; and The Protocol Prohibiting the Use in War of Asphyxiating Poisonous, or other Gases, and of Bacteriological Methods of Warfare (1925); etc.

<sup>34</sup> *The New York Times*, September 26, 1937.

<sup>35</sup> *New York Herald Tribune*, October 8, 1937.

Combination of clinical history with physical findings convinces us that patients are suffering from effects of vesicant agent, most likely gas of the mustard group, which was released from gas bombs or shells and struck them in a low state of concentration.<sup>36</sup>

## 2. MARITIME WARFARE

(a) *The Sinking of Fishing Junks.* By the general consent of the civilized nations of the world, it is an established rule of International Law that "coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war," the ground being "considerations of humanity to a poor and industrious order of men."<sup>37</sup>

This rule is explicitly stipulated in Article 3 of Convention XI of the Second Hague Conference, which states: "Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo."

If fishing vessels are to be exempt from capture, they ought certainly not to be attacked, sunk, or destroyed.

On September 27, *The New York Times* reported: "For the past few weeks Japanese warships have been systematically destroying Chinese trading and fishing junks and often displaying callous disregard of human life. The story of the sinking of a fleet of junks by a Japanese submarine, with the loss of about 300 lives—men, women, and children—was brought to Hong Kong today by ten survivors aboard the German liner *Scharnhorst*. Several of these survivors were wounded; they were placed in hospitals here. . . . They reported that on September 22 a Japanese submarine shelled the fishing fleet of twelve craft not far outside British waters, and some of the junks in the fleet, they said, were of British registry, operating from Hong Kong villages. The men told of the terror in the fleet as junk after junk was sunk by the submarine, which, they said, made no attempt to rescue anyone."

On September 29, the United Press cabled: "European passengers arriving today on the British steamship *Kaying* said that the ship picked up two Chinese, floating on a bamboo raft, who asserted that they were additional survivors of more than 300 men, women, and children of a fishing fleet shelled by a Japanese submarine."

On the same day, both the United Press and the Associated Press also reported that the British steamer *Kaying* was stopped by a Japanese destroyer but was permitted to proceed. Then the passengers, mostly British and German, saw the destroyer fire on two Chinese fishing junks. The attack took place ten miles off Hong Kong on September 27.

The Japanese admiralty denied the sinking of the fleet, according to a

<sup>36</sup> *Trans-Pacific News Service*, October 14, 1937.

<sup>37</sup> The Case of the *Paquete Habana*, 175 U. S. 677 (1900).

report of the United Press on September 29. But on October 1, the Associated Press reported that the Naval Ministry at Tokyo "admitted that the Japanese warships had attacked Chinese junks in South China waters. The attacks, the Ministry's statement declared, were necessary in self-defence."

At present, the British authorities at Hong Kong are reported to have opened an official inquiry into the sinking of a fleet of fishing junks under British registry.

These wanton attacks upon helpless fishermen and traders, together with their families and property, were not only a violation of the law of war enjoining that violence be directed only against military objectives, but also showed a complete disregard of the supreme value of human life. The sinking of the fishing junks, says *The London Times* editorially, "is a crime revolting not only to the world at large, but to all Japanese who still honor the chivalrous traditions of the Samurai." <sup>38</sup>

### 3. AERIAL WARFARE

(a) *Fundamental Rules.* The Proposed Code of Air Warfare Rules of 1923, drafted at the Hague, includes:

Article 22.—Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited.

Article 24.—(1) Aerial bombardment is legitimate only when directed at a military objective—that is to say, an object of which the destruction or injury would constitute military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes.

(3) The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighborhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated that they cannot be bombarded without indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

In a Resolution adopted by the General Commission of the Disarmament Conference in July, 1932, it was laid down that "air attack against the civilian population shall be absolutely prohibited." <sup>39</sup>

"The fact that neither this Resolution nor the Hague Rules of 1923 have become part of International Law ought not to be interpreted as meaning that the matter is not governed by existing principles of law. The immunity

<sup>38</sup> Quoted in *New York Herald Tribune*, September 29, 1937.

<sup>39</sup> League Documents, 1932, IX, 63, p. 268.

of non-combatants from direct attack is one of the fundamental rules of the International Law of war. It is a rule which applies with absolute cogency alike to warfare on land, at sea, and in the air. . . .

"There ought, therefore, to be no doubt that International Law protects non-combatants from indiscriminate bombardment from the air, and that recourse to such bombardment constitutes a war crime."<sup>40</sup>

(b) *The Japanese Warning.* On September 19, foreign diplomats at Nanking received from Vice Admiral K. Hasegawa, Commander-in-Chief of the Japanese Third Fleet, a warning that all foreigners should evacuate Nanking and withdraw into areas of greater safety before 12 o'clock noon of September 21, when "the air forces will take whatever measures that are necessary against Nanking," which is "the base for China's military opposition against Japan."<sup>41</sup>

Immediately after the warning, the American and British Governments took swift diplomatic actions to avert, if possible, a tragedy on an immense scale in Nanking. In a note to Tokyo, the American Government stated:

This Government holds the view that any general bombing of an extensive area wherein there resides a large populace engaged in peaceful pursuits is unwarranted and contrary to principles of law and of humanity. . . .

In the light of the assurances repeatedly given by the Japanese Government that the objectives of Japanese military operations are limited strictly to Chinese military agencies and establishments and that the Japanese Government has no intention of making non-military property and non-combatants the direct objects of attack, and of the Japanese Government's expression of its desire to respect the embassies, warships and merchant vessels of the Powers at Nanking, the American Government cannot believe that the intimation that the whole Nanking area may be subjected to bombing operations represents the considered intent of the Japanese Government. . . .<sup>42</sup>

The British note to Tokyo reminded Japan that she should confine her bombing attacks to legitimate military objectives. The entire city of Nanking is not such an objective, according to the note, and a wholesale attack upon it would endanger the lives of non-combatants, including those of the British subjects now residing in that city.<sup>43</sup>

Other nations, France, Germany and Russia, also protested against the indiscriminate bombardment of the Chinese capital.

(c) *The Bombardments.* Defying the protests of the leading nations of the world, Japan started on September 22 systematic and wholesale bombardments, not only of the Chinese capital, but also of a score of other cities, including the southern metropolis Canton and the greatest central city Hankow. At this writing, the bombardments are still going on. The exact number of

<sup>40</sup> Oppenheim, *op. cit.*, II, 417-419.

<sup>41</sup> *The New York Times*, September 20, 1937.

<sup>42</sup> *The New York Times*, September 22, 1937.

<sup>43</sup> *The New York Times*, September 21, 1937.



civilians killed and wounded cannot be known, but the total is mounting daily. A few cases may be indicated here to illustrate the extent of the air raids.

*Nanking.* On September 23, the Associated Press reported:

"More than fifty Japanese planes took part in two raids, killing or wounding more than 200 Chinese civilians, mostly in the poor quarter of the city. Scores were burned to death as incendiary bombs lighted tinder-like straw huts along the Yangtze River front.

"Most of those who died were too feeble or helpless to join the great exodus to the open countryside to escape the death from the skies. . . .

"Thirty sections of the capital were bombed, with an average of three bombs for each spot. . . .

"Nearly all the havoc fell on denizens of the Hsiakwan slum quarter, huddled near the Yangtze waterfront. The sight of old men, women, and children mangled by bombs or burned to death or beyond aid was heart-rending. . . ."

*Canton.* On September 23, the Associated Press reported:

"Americans and other foreign observers told of harrowing scenes in Canton, where uncounted corpses littered the streets after a series of bombings which apparently surpassed in destructive effect anything either Nanking or Shanghai had felt.

"Eyewitnesses said they were appalled by the extent of the slaughter. They told of seeing weeping women and children searching the ruins for lost relatives, and of thousands roaming the streets bewildered or deranged by anguish and terror.

"Nearly all victims were civilians, most of them refugees huddled in pitiful camps. Foreign observers said the bombers had not damaged a single government building or military establishment in Canton."

*Hankow.* On September 25, the Associated Press reported:

"A Japanese air fleet penetrated the heart of China yesterday to bomb the Wuhan cities—Hankow, Wuchang, and Hanyang—where estimates of the dead ranged between 100 and 200 and of wounded between 200 and 500.

"Nearly all the victims were non-combatants, many of them women and children, stricken when the raiders bombed and machine-gunned Wuchang, on the south side of the Great Yangtze River. . . .

"Two bombs then plunged into the river near the Aphis and Cricket, but did no damage. The planes swarmed over Wuchang, where the greatest punishment was inflicted. Bombs plunged into narrow, teeming streets, while the pursuit planes swooped low with their machine guns blazing. . . ."

Commenting on the Japanese bombardments, Prof. James W. Garner states: The Japanese Government "makes no pretense of an endeavor to confine its bombing operations to defended or fortified towns or to military objectives in those which are not defended or fortified. All towns, whatever their character, within the radius of action of its air squadrons are bombed without discrimination. . . . The distinction between combatants and non-combatants which the Hague Commission declared to be fundamental has been



thrown into the scrap heap, air raids are being directed almost daily against the civilian population of many towns, cities and districts with no other object in view than to terrorize the inhabitants and drive the nation into submission. . . .”<sup>44</sup>

*The New York Times* declares editorially: “If there is not a touch of madness in the policy upon which Japan has now embarked, what is there to explain it? These bombings of defenceless cities have been undertaken, said a spokesman of the Japanese navy yesterday at Shanghai, ‘in order to bring the war to an early conclusion, and make it impossible for China to continue its anti-Japanese policies.’ But hundreds of headless coolies cluttering the debris-littered streets of Canton do not impair the strength of China’s arms or weaken the defense of Shanghai. Lines of communication are comparatively unimportant in this struggle and attacks from the air cannot decide the issue. . . . The present policy of *Schrecklichkeit* is as stupid as it is brutal. . . .”<sup>45</sup>

“The world watches Japan’s action with growing resentment and disgust,” declares *The London Times*. “Tokyo claims all air raids have been directed against military, or at any rate, strategic, objectives, but ascertainable damage done such objectives has been infinitesimal by comparison with the havoc wrought among civilians in thickly populated districts. . . . Her resort to the tactics of barbarism is a symptom of her impatience, if not of her alarm, and by making that resort she has conjured up a menace ultimately greater than that represented by the elusive and indestructible Chinese soldier, and she is earning the unqualified condemnation of the world, on whom—whether she is at peace, whether she is at war, or whether she is making good the gains of war—she vitally and inescapably depends.”<sup>46</sup>

(d) *The Red Cross and Hospitals*. “In order that the wounded and sick may receive proper treatment, mobile medical units and fixed establishments of the medical service must be respected and protected by the belligerents.”<sup>47</sup> It is the general practice of civilized nations that the Red Cross and hospitals are respected and protected in war.

On September 27, it was reported that the Central Hospital and the Central Field Health Station were bombed by Japanese airplanes, causing the death of 150 patients and of some staff members and servants. Those medical establishments flew the Red Cross emblem on their roofs and were distinctly recognizable.<sup>48</sup>

The British Ambassador to Tokyo lodged a protest with the Japanese Government on September 28 against the bombing of the Central Hospital.<sup>49</sup> On September 29, the League of Nations decided to send a health mission to

<sup>44</sup> *Garner’s Letter to The New York Times*, October 3, 1937.

<sup>45</sup> *The New York Times*, September 24, 1937.

<sup>46</sup> Quoted in *New York Herald Tribune*, September 29, 1937.

<sup>47</sup> The Convention of 1929, which replaces the Geneva Convention of 1864 and the New Geneva Convention of 1906.

<sup>48</sup> *New York Herald Tribune*, September 28, 1937.

<sup>49</sup> *New York Herald Tribune*, September 29, 1937.

China, upon China's appeal for help and the report of the bombing of the Central Hospital.

(e) *Historical Monuments and Cultural Institutions.* One of the most regrettable violations of International Law during the three-month-old warfare is the destruction of buildings and establishments which fall under the category of historic monuments and institutions devoted to art, science, education, and religion.

It is an established rule of the law of war that works of art and science, and historic monuments, may not under any circumstances or conditions be destroyed, seized, or made use of for military purposes.<sup>50</sup>

Some of the well-known institutions and monuments that have been damaged or demolished by the Japanese airplanes are listed here.

Nankai University, Tientsin, demolished.  
National Central University, Nanking, demolished.  
University of Shanghai (American supported), damaged.  
Tung Chi University, Shanghai, demolished.  
Chi Tso University, Shanghai, demolished.  
Fu Tan University, Shanghai, demolished.  
National Chi Nan University, Shanghai, damaged.  
National Sun Yat-sen University, Canton, damaged.  
Sun Yat-sen Memorial Hall, Canton, destroyed.  
Anhui University, Anking, damaged.

The following monuments and institutions have been seized or occupied by the Japanese troops for military purposes:

The Temple of Heaven, Peiping.  
The Summer Palace, Peiping.  
National Tsing Hua University, Peiping. (Partly occupied.)  
National University of Peking, Peiping. (Partly occupied.)

There are other less known monuments and institutions not listed here, which have been destroyed or occupied by Japanese forces.

Japan of course asserts that the destruction of those historic monuments and institutions is a military necessity or a measure of self-defence. The mere fact, however, that within only three months of the Undeclared War so many colleges and universities have been demolished or damaged shows clearly that Japan intends deliberately and systematically to wipe out the cultural achievements of ancient China as well as of modern China. It may be recalled that in the undeclared war of Shanghai, 1932, Japan deliberately burned the Commercial Press, the largest printing house in the Far East. Japan has thought that the intellectual class in China is mainly responsible for the newly awakened national movement and for the "anti-Japanese" movement and consequently believes a destruction of the universities and colleges will stop the movements. The Japanese militarists must be aware

<sup>50</sup> The Hague Regulations, Art. 56; Oppenheim, *op. cit.*, II, 320.

of the general rule that if an invader "makes a war upon monuments of art and models of taste, he violates the modern usages of war, and is sure to meet with indignation and resentment and to be held up to the general scorn and detestation of the world."<sup>51</sup>

(f) *Neutral Lives and Property.* Not only have Chinese civilians suffered heavily from the indiscriminate bombardments of the Japanese airplanes, but neutral lives and property have also been wounded and damaged in no small degree.

On August 26, the British Ambassador, Sir Hughe M. Knatchbull-Hugessen, was attacked by machine-gun fire from a Japanese airplane. Two days later, in a sharp note to Tokyo, the British Government declared that "it is one of the established rules of International Law that direct and deliberate attacks on non-combatants are absolutely prohibited, whether inside or outside the area in which hostilities are taking place." The note condemns Japan's "failing to draw that clear distinction between combatants and non-combatants in the conduct of hostilities which International Law no less than the conscience of mankind has always enjoined."<sup>52</sup> On October 12, three Japanese airplanes once more attacked three automobiles of the British Embassy.<sup>53</sup> The automobiles, going from Shanghai to Nanking, had the British flag over them. These automobiles, regardless of their nationality, were certainly not military objectives. The unfortunate incident is but another illustration of Japan's disregard for International Law which prohibits "deliberate and direct attacks on non-combatants."

It is clear that Japan must be held responsible for the loss of neutral lives and the damage to neutral property. The American note to Tokyo, protesting against Japanese bombing, has already reserved "all rights on its own behalf and on behalf of American nationals in respect to damages which might result from Japanese military operations in the Nanking area."<sup>54</sup> The British Government also has reserved the right to hold Japan strictly responsible for any loss of British lives or damage to British property that might be caused by the Japanese air raids.<sup>55</sup> The French Government warned Japan that it "would hold the Japanese Government responsible for damages that may be caused to lives or interests of French residents of Nanking."<sup>56</sup>

The incident of the American liner *President Hoover* must be mentioned at this point.<sup>57</sup> On August 31, the liner was bombed by a Chinese airplane. The pilot thought that the liner was one of the ten Japanese troopships, two of which were maneuvering nearby. The incident was an unfortunate acci-

<sup>51</sup> Kent, *Commentaries on American Law*, I, 93.

<sup>52</sup> The text of the British note may be found in *The New York Times*, August 30, 1937.

<sup>53</sup> *The New York Times*, October 13, 1937.

<sup>54</sup> *The New York Times*, September 23, 1937.

<sup>55</sup> *The New York Times*, September 22, 1937.

<sup>56</sup> *The New York Times*, September 23, 1937.

<sup>57</sup> The incidents of the U. S. Flagship *Augusta*, the Cathay Hotel, and the Sincere Store are not discussed here, for there is still much dispute as to the origins of the bombs and anti-aircraft shells involved in these cases.

dent in the military operation. It was clearly not a deliberate attack upon non-combatant neutrals. At any rate, as *The New York Times* said, "The Chinese, bombing an American vessel on its way to Shanghai, in the mistaken belief that it carried another contingent of an invading army, have at least not blundered as obviously and as disgustingly as the Japanese, bombing large masses of non-combatants on Chinese soil and riddling with machine-gun fire, far behind the battle lines which their own troops created, an automobile carrying the British Ambassador."<sup>58</sup>

It is to be observed that the Chinese Government, immediately after the *Hoover* incident, accepted complete responsibility and promised "fullest redress" for "the most regrettable, unfortunate mistake." On the other hand, the Japanese Government, while expressing deep regrets over the Ambassador case, has not as yet assumed the responsibility of machine-gunning the British Ambassador to China.

Secretary of State Hull appealed to both China and Japan to cease hostilities in and around Shanghai. The British Government actually proposed that both parties withdraw their forces from the great Far Eastern metropolis. It may be added here that China agreed, while Japan refused, to "neutralize" Shanghai, where neutral lives and interests were immediately involved and critically endangered.

(g) *The Verdict of the World.* The League Assembly, representing 52 nations of the world, on September 28, approved a resolution, adopted the day before by the Far Eastern Advisory Committee, condemning the Japanese method of aerial warfare. The delegates burst into applause as the Aga Khan, President of the Assembly, announced that the Assembly had unanimously approved the following resolution.

The Advisory Committee, taking into urgent consideration the question of the aerial bombardment by Japanese aircraft of open towns in China, expresses its profound distress at the loss of life caused to innocent civilians including great numbers of women and children, as a result of such bombardment, and declares that no excuse can be made for such acts, which have aroused horror and indignation throughout the world, and solemnly condemns them.<sup>59</sup>

Thus, the world has handed down its final verdict upon the deliberate and direct aerial attacks upon Chinese non-combatants by Japanese aircraft. Such attacks are not only contrary to the law of nations but also revolting to the conscience of mankind.

This paper has come to an end temporarily. It cannot be better concluded than by quoting a few sentences from the great speech of President Roosevelt, delivered at Chicago, on October 5, a speech which was, as Prime Minister Chamberlain put it, "a clarion call as welcome as it was timely," a

<sup>58</sup> "Bombs at Shanghai," an editorial of *The New York Times*, August 31, 1937.

<sup>59</sup> The text is taken from *The New York Times*, September 28, 1937.



call to all nations to return to belief in the pledged word and the sanctity of International Law.

The political situation in the world, which of late has been growing progressively worse, is such as to cause grave concern and anxiety to all the peoples and nations who wish to live in peace and amity with their neighbors.

Some nine years ago the hopes of mankind for a continuing era of international peace were raised to great heights when more than sixty nations solemnly pledged themselves not to resort to arms in furtherance of their national aims and policies. The high aspirations expressed in the Briand-Kellogg Peace Pact and the hope for peace thus raised have of late given way to a haunting fear of calamity.

The present reign of terror and international lawlessness began a few years ago. It began through unjustified interference in the internal affairs of other nations or the invasion of alien territory in violations of treaties, and has now reached a stage where the very foundations of civilization are seriously threatened. The landmarks and traditions which have marked the progress of civilization toward a condition of law, order and justice are being wiped away.

Without a declaration of war and without warning or justification of any kind, civilians, including women and children, are being ruthlessly murdered with bombs from the air. In times of so-called peace ships are being attacked and sunk by submarines without cause or notice. . . . Innocent peoples and nations are being cruelly sacrificed to a greed for power and supremacy which is devoid of all sense of justice and humane considerations. . . .

The peace-loving nations must make a concerted effort in opposition to those violations of treaties and those ignorings of humane instincts. . . .

It is true that the moral consciousness of the world must recognize the importance of removing injustices and well-founded grievances; but at the same time it must be aroused to the cardinal necessity of honoring sanctity of treaties, of respecting the rights and liberties of others, and of putting an end to acts of international aggression.





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